

REMARKS

Claims 1 through 10 have been rejected by the Examiner. Claims 1 and 6 have been amended to specify that the containment defines a single interior compartment that encases a single activatable thermochemical composition therein. Support for the amendments can be found throughout the specification and figures as filed, and no new matter has been added by way of the amendments herein above. Claims 1 through 10 are pending in the application.

Rejection under 35 U.S.C. §103:

The Examiner maintains the rejection of claims 1 through 10 under 35 U.S.C. §103(a) as being unpatentable over Kitahara et al. U.S. Patent No. 5,261,241 in view of Maro et al. U.S. Patent No. 5,491,018 and further in view of Helming U.S. Patent No. 6,648,909. Applicants respectfully traverse this rejection for the following reasons.

The Examiner continues reliance upon Kitahara for a thermal device containing a flexible plastic containment and thermochemical composition, and relies upon Maro et al. for silicone oxide coated polyester and Helming for LDPE bag. The Examiner concludes that Applicants' invention would have been obvious to one of ordinary skill in the art because one would have been allegedly motivated to combine the references and made modifications as obvious design choices.

Kitihara et al. relates to a refrigerant device and in Example 11, refers to an aluminum laminated film. There are substantive physical and chemical difference between an aluminum sheet and oxide coatings. Maro et al. is directed toward a packaging material. As packaging materials are not intended to be placed against the

skin to effect thermal therapy, it is still not understood why one of ordinary skill in the art would view a packaging material and have been lead to a topical thermal therapy device.

To this, the Examiner argues that a teaching of an inner rupturable layer of LDPE film in Helming that affords desired rupturability properties would have motivated one of ordinary skill to utilize a LDPE and EVA blend with Maro and Kitahara as a matter of “obvious design choice.” Applicants are at a loss to understand this argument because Applicants’ invention does not involve a rupturable barrier component and, in fact, such would be against the functional attributes on the instant invention.

The Examiner argues that Applicants’ claims are not preclusive of a containment with separated chemical ingredients and rupturable barriers/membranes in order to justify maintaining the alleged applicability of the prior art. Applicants have amended independent claims 1 and 6 to preclude the embodiments the Examiner alleges were broadly encompassed by the original claims, i.e., separated thermochemical ingredients to be combined by ruptured barriers, and rupturable barriers or membranes.

The Examiner argues that Kitihara et al., although not specifically teaching a topically applied device, is nevertheless still theoretically *capable* of topical application and therefore relevant. This is a creative gap-filling for the absence of a fair teaching or suggestion founded upon an inappropriate level of hindsight on the Examiner’s behalf.

The Examiner appears to be unfamiliar with the chemical aspect of Applicants’ invention. The Examiner appears to erroneously believe that the “aluminum laminated film” of Example 11 of Kitahara is equivalent or suggestive of aluminum oxide coating simply because a periodic element is shared between the two compositions. It is from this misinformation that the Examiner believes “clearly serves to further support the

motivation for combining the Maro et al reference and its teaching.” (see Office Action page 6). To be clear, oxide coatings such as those used in the instant invention do not constitute laminated films to one of ordinary skill in the art. The Examiner’s alleged “clear support of motivation to combine” is, therefore, technologically non-sensical.

Given the above, the Examiner has not presented a set of references that, alone or in combination, fairly teach or suggest Applicants’ claimed invention. Nor can a reasonable motivation be found within or between these references that would have lead one of ordinary skill in the art to arrive at Applicants’ invention, as the gaps and lack of relationship between the technologies described in the references are substantial. These references are inadequate to support a proper rejection based on obviousness grounds.

Given the above, the claimed invention is not unpatentable over the Kitahara, Maro and Helming references within the proper meaning of 35 U.S.C. §103. This rejection should, therefore, be withdrawn.

Conclusion:

In light of the above amendments and the accompanying remarks, it is believed that the application is now in condition for allowance, and prompt notification to that effect is earnestly solicited. The Examiner is invited to contact the undersigned to

discuss the application on the merits if it is believed that such discussion would expedite the prosecution.

Respectfully submitted,

Dated: Oct 26, 2005



Andrew G. Rozycki, Reg. No. 36,406
Attorney for Applicants
Cardinal Health, Inc.
7000 Cardinal Place
Dublin, Ohio 43017
Tel. (614) 757-7413
Fax (614) 757-2243